Editor's note: Erratum issued March 1, 1976 -- See 23 IBLA 11 A & B below.

MALCOLM N. McKINNON

IBLA 75-593 Decided November 25, 1975

Appeal from the rejection of an application to modify an existing coal lease by adding a section of land to the leased area.

Vacated and remanded.

1. Act of January 25, 1927--Mineral Lands: Generally--School Lands: Mineral Lands

   Where, after Statehood, a designated school section is surveyed and returned as mineral land (coal) known to be mineral in character prior to the date when the rights of the State would have attached, and where prior to the Act of January 25, 1927 (44 Stat. 1026), the land is withdrawn for national forest purposes, title to the section did not pass to the State.

2. Administrative Procedure: Adjudication--Coal Lands--Coal Leases and Permits: Generally

   In order for an assertion of competitive interest to create a bar to the allowance of an application to modify an existing coal lease by the addition of contiguous land, the competitive interest asserted must be identifiable, substantial and genuine, and not merely speculative or casual.

APPEARANCES: Malcolm N. McKinnon, pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

The factual background of this case is perhaps best explained by the following direct quotation from appellant's statement of reasons for appeal:

* * * * * * *

> This date [February 3, 1962] is the date on which I applied for two leasing units which were subsequently awarded to me and given the numbers U-084923 and U-084924.
>
> Before applying for these leasing units I took a plat into the United States Geological Survey office to see if the lands I wanted were owned by the United States Government and open for leasing.
>
> These plats contained the acreage I was awarded plus section 32, Township 16 South, Range 7 East, Salt Lake Meridian, Utah.
>
> Mr. Earnest Blessing and Mr. Pearce who were in charge of the local United States Geological Survey office at that time, both said that they could not approve this section 32 because it was not owned by the United States Government, but was state land and that it was open for leasing from the State of Utah. Just to be absolutely sure that it was state land, Mr. Blessing had Mr. Pearce go into the Bureau of Land Management and returned with the assurance the Bureau of Land Management records showed it to be state land and that they had been carrying it as state land for years on their records.
>
> I therefore on February 3, 1962 deleted said section 32 from my application and applied for the other adjoining acreage which was awarded to me and given the lease numbers of U-084923 and U-084924 respectively.
>
> On March 30, 1962 I applied to the State of Utah for the section in question correctly described as Section 32, Township 16 South, Range 7 East, Salt Lake Meridian, Utah. The lease was awarded to me on July 7, 1962 and given the designation of Utah State Lease #ML19342. I have held this lease in good standing ever since and claim a good and valid lease from the State of Utah.

* * * * * * *

> Before I started to do the bulldozer work that needs to be done to make it possible to put in the kind and size of operation I intend to run there, it was necessary to obtain a special use permit from the Forest Service. It was while discussing this matter with them that they called my attention to the fact that all of their maps showed this Section 32 under discussion to be federal land.
>
> Naturally this disturbed me to no end, so I immediately checked with the Bureau of Land Management office here in Salt Lake City and also the United States Geological Survey office and both offices were carrying it as state land.
>
> I immediately hired an abstractor here in Salt Lake City and also one in Washington, D.C. and it is from their findings that it is very clear in our opinion that the state has just as good a title, to not only this Section 32, but also Section 2 in this same township, as does the Federal Government.
>
> * * * * * * *

Despite his stated conviction that the State of Utah `has just as good a title' to section 32 as the United States does, McKinnon applied to the Utah State Office of the Bureau of Land Management to modify his existing coal lease (SL 050862 - U 24069 - U 24070) by adding section 32 to that federal lease, as authorized by 30 U.S.C. § 203 (1970). That office rejected his application by its decision dated April 28, 1975. From that decision McKinnon has brought this appeal.

[1] The first issue to be resolved is whether section 32, T. 16 S., R. 7 E., SLM, is owned by the United States or by the State of Utah. The land status records of BLM show that the survey of this section was approved on March 5, 1902, and was designated as coal land (mineral). Because it was then known to be mineral in character, containing valuable deposits of coal, the title thereto could not pass to the State at that time. On May 26, 1902, the entire township was withdrawn pending inclusion in the Wasatch Forest Reserve. On January 18, 1906, the section was included in those lands withdrawn for Manti National Forest. There were various other mineral classification and withdrawal orders applied to section 32 through the years, but there is no record of the mineral classification being revoked or of the land being taken out of national forest status. This continuous withdrawal for national forest purposes prevented the land from passing

to the State by the Act of January 25, 1927 (44 Stat. 1026), as lands within `existing reservations' were excluded from passage by subsection (c) of section 1 of the Act. `Existing reservations' include national forests. Instructions, 52 L.D. 51 (1927).

The case record also contains references to the fact that the underlying coal seams had been opened up and operated since 1875, and that a Federal coal lease issued in 1919 for 5 years, and that one Lars Christian held a Federal lease on section 32 in 1925.

On June 8, 1925, a contest proceeding styled United States v. State of Utah, Contest No. 4827, was initiated to resolve the conflicting claims of title to section 32 by the State and the United States. After 2 days of hearing, the State's claim was rejected upon the following finding:

> The township plats of each of the townships here involved were accepted March 5, 1902. All of the land in question was withdrawn by the Secretary of the Interior May 26, 1902 pending inclusion in the Wasatch Forest Reserve. It was withdrawn by proclamation of May 29, 1903, January 18, 1906, and June 27, 1913 for the Manti National Forest. * * * The lands in Township 16 South Range 7 East were withdrawn under the coal land laws June 26, 1906; classified as coal land at $25 to $50 per acre by Commissioner's letter `N' July 3, 1907, reclassified as coal land at $100 to $170 per acre by Commissioner's letter `N' March 30, 1911.

Although the State of Utah allegedly filed an appeal from this decision, there is apparently no record of any further action or decision arising from this proceeding. Accordingly, we regard the issue of ownership to be res judicata. See L. M. Perrin, Jr., 9 IBLA 370 (1973).

Moreover, the report of one of the law firms employed by the appellant to research the title indicates that although the State of Utah has treated section 32 as State-owned land from time to time, issuing mineral and surface leases therefor, the records of the Division of State Lands also include several entries which indicate a recognition of the fact that section 32 is not State land. Most recent of these entries, according to the abstract, was the cancellation of the State of Utah's grazing lease L-15818, covering all of section 32, on December 21, 1970, for the reason that the land is not owned by the State.

There being much evidence to indicate that the title never passed to the State, and no countervailing evidence that it did, we must conclude that section 32 is Federal land.

[2] The statute under which McKinnon applied to have section 32 added to his contiguous consolidated lease provides:

> Any person, association, or corporation holding a lease of coal lands or coal deposits under this chapter may, with the approval of the Secretary of the Interior, upon a finding by him that it will be for the advantage of the lessee and the United States, secure modifications of his or its original lease by including additional coal lands or coal deposits contiguous to those embraced in such lease, but in no event shall the total area embraced in such modified lease exceed in the aggregate two thousand five hundred and sixty acres.

30 U.S.C. § 203 (1970).

Thus, in addition to the acreage limitation, the criteria for allowing an application under this proviso are (1) that the land applied for must be contiguous to other federal lands leased by the applicant for coal; (2) that it be to the advantage of the applicant; and (3) that it be to the advantage of the United States.

Among the implicating regulations, at 43 CFR 3524.2-1(a), is the following:

> (ii) Competitive. If however, it is determined that the additional lands or deposits can be developed as part of an independent operation or that there is a competitive interest in them, they will be offered as provided in subpart 3520.

McKinnon's federal lease is contiguous to section 32, and there is every evidence that the addition of this section would be to his advantage. His application was rejected, inter alia, for the reason that allowing it `would not be to the advantage of the United States to award a lease noncompetitively.' The reasons given for this finding are:

> [Section 32] can be mined as part of an independent operation, and there is competitive interest in this tract. In addition, the land has substantial market value and it would not be to the advantage of the United States to award a lease noncompetitively. Therefore, the application does not qualify under Section 3 of the Act.
>
> * * * * * * *

Further, any leasing of this land would have to be by competitive bid, should the Bureau of Land Management decide to offer this land for coal leasing.

The first paragraph of the above-quoted portion of the decision is taken verbatim from the October 23, 1974, report by the Chief, Conservation Division, Geological Survey. No additional explanation is provided, and no other reasons are given. Considered in isolation, the report might be considered adequate to sustain the conclusion. See 43 CFR 3524.2-1; Intermountain Exploration Co., 17 IBLA 261, 81 I.D. 602 (1974); Western Stope Carbon Inc., 5 IBLA 311 (1972). However, when read in conjunction with prior and subsequent Survey reports, it is cast into doubt.

In his memo of September 5, 1973, before it was known that section 32 was federal land, the Chief, Conservation Division wrote:

> The lands involved in the subject assignments and consolidation are located in T. 16 S., R. 7 E., in Rilda Canyon, a tributary to Huntington Creek in Emery county, Utah.
>
> The assignee, Malcolm N. McKinnon, holds State leases on sec. 36, T. 16 S., R. 6 E., SLM, and sec. 32, T. 16 S., R. 7 E., SLM. Acquisition by McKinnon of the proposed assignments would give access to Rilda Canyon on the coal outcrop and allow the State lease and the assigned Federal lands to be mined as an independent mining unit. Deletion of the small tracts from U-06039 and U-024319 will not materially reduce the value or the available reserves in these leaseholds.
>
> The lands proposed for consolidation are contiguous and with the McKinnon State lease, will form a logical mining unit which will be in a competitive position with Peabody Coal Company's holding in the area. Acquisition of the lands by McKinnon and the development of the competitive situation will be in the public interest.
>
> Accordingly, the Geological Survey recommends that the subject assignment and partial assignments be approved and that the three parcels be combined into a single lease as requested * * *. (Emphasis added.)

After McKinnon found that section 32 as listed as federal lead and had filed his application to have it added to his existing consolidated lease the Chief, Branch of Realty Services (BLM)

in Salt Lake City, requested a report from the Area Mining Supervisor, an employee in the Conservation Division of the Geological Survey, who responded on November 5, 1974, with the following:

> Attached is a map showing coal lease SL-040862-U-24069-U-24070 of Malcolm McKinnon, coal lease U-7653 subleased by McKinnon, State lease sec. 36 of McKinnon, and sec. 32, T. 16 S., R. 7 E., SLM, now requested by McKinnon.
>
> Coal lease SL-050862-U-24069-U-24070 does not contain sufficient reserves to justify the capital expense required to open a mine according to today's standards. However, the combination of the four tracts constitute a logical mining unit with sufficient reserves to justify the expense required to open a moderate sized mine. In addition the mine would have access to the outcrop through SL-050862-U-24069-U-24070.
>
> * * * * * * *
>
> In the Carbon-Emery County area, the coal market for commercial and small industrial users is very tight. In my opinion there is a need for additional sources in the area to supply this market. A mine opened on the tracts requested and controlled by McKinnon could partially meet this need.
>
> The land requested by McKinnon has substantial market value at this time. (Emphasis added.)

The Area Mining Supervisor's memo can only be regarded as a statement that development of a mine by McKinnon would be both feasible and desirable. Moreover, it makes no reference to the existence of competitive interest. It does not appear that this report was considered in making the decision.

The foregoing reports indicate that, contrary to the decision, there are numerous advantages to be gained by the United States through granting the modification sought. The Area Mining Supervisor and the Chief, Conservation Division, are in agreement on the following points:

1. The addition of section 32 will create a logical independent mining unit.

2. The existing lease held by McKinnon would provide access to the coal outcrop on section 32.

3. The development of a mine by McKinnon on these lands would create a competitive situation which would be in the public interest.

The Area Mining Supervisor's report suggests these additional advantages:

4. Without the addition of section 32 the federal lease held by McKinnon cannot be developed. This connotes a loss of royalty to the United States, and the loss of the coal which might otherwise be produced from that lease.

5. A `very tight' coal market exists in a two-county area due to a shortage for commercial and small industrial users, which could be alleviated by the development of the mine proposed by McKinnon. This carries economic implications relating to employment and costs.

The finding in the decision below that section 32 `can be mined as part of an independent operation' could be a reason for granting the application rather than for rejecting it, since the reports show that it could be developed as part of McKinnon's independent operation, based upon the recommendations that such a lease would form `a logical independent mining unit,' and based upon the access to the outcrop thus afforded, and upon competitive considerations.

The reports of record and the appellant's statement of reasons indicate that the only other possible means of developing a mine on section 32 would be to lease it to Peabody Coal Company, which also has an adjacent lease. Peabody, according to the reports, is presently the only producer in the area, and it was reported that if McKinnon could form `a logical mining unit' comprised of this land and the leases he now holds, that unit `would be in a competitive position with Peabody Coal Company's holdings in the area,' and that this `will be in the public interest.'

43 CFR 3524.2-1 provides that if it is determined that the additional lands or deposits can be developed as part of an independent operation or that there is competitive interest in them, they will be offered at competitive bidding. However, the `independent operation' to which the regulation alludes must refer to an operation other than the applicant's or else the regulation would defeat the operation of the statute, since the deposit must always fit into the applicant's operation to receive favorable consideration.

There is some doubt that acquisition of section 32 by Peabody Coal Company would form a logical mining unit which would allow

section 32 to be developed `as part of an independent operation,' since the best access to the coal outcrop is apparently over McKinnon's lease. If Peabody's access is inadequate, then section 32 could be mined only as part of McKinnon's independent operation, as proposed. If, however, Peabody could utilize section 32 as part of its independent operation and had expressed an interest in acquiring the land competitively, then the regulation would require that a lease could issue only by competitive bidding.

Moreover, while the October 23, 1974, report of the Chief, Conservation Division, refers to the existence of competitive interest in section 32, the source or extent of that interest is not indicated. No such competitive interest is noted in the subsequent report of the Area Mining Supervisor. Appellant, in his statement of reasons, notes that he acquired his present consolidated lease by assignment from Peabody Coal Company in exchange for some lands which he held in Deer Creek Canyon, which are now being mined by Peabody. Appellant states that it is his opinion that `Peabody would not do anything to prevent me from securing and working said section 32.'

Even if Peabody Coal Company is the source of the competitive interest, we question, without deciding, whether competitive interest in a tract which could defeat the public interest is within the contemplation of the regulation (43 CFR 3524.2-1(a)(2)(ii)). This is not an attack on the wisdom or efficacy of the regulation. But, in the unusual circumstances of this case, if it be found that the only logical independent mining operation that the deposit could be part of is the applicant's; and if it be found that by awarding the lease to another the public interest would be defeated or the deposit would be held by one who could not utilize it as part of his own independent operation, then consideration should be given to whether the letter of the regulation should be applied so as to contravene the spirit and purpose of the statute.

Finally, in order to create a bar to the allowance of such an application, the competitive interest asserted must be identifiable, substantial and genuine, and not merely speculative or casual.

The only disadvantage which would accrue to the United States through granting this application would be the loss of the bonus which competitive bidding could be expected to yield. However, in enacting this provision of the statute the Congress must have expected that by authorizing `coal lands or coal deposits' to be added to contiguous leases without competitive bidding, there would be no bonus. The proviso of 30 U.S.C. § 203 creates an alternative to the requirement for competitive bidding in situations where the resultant mutual advantages would supplant the bonus. Were it otherwise, 30 U.S.C. § 203 and § 204 would be

virtually inoperative, as both provisions envisage the addition of known deposits of workable coal to existing leases, and nearly all such deposits would yield a bonus if offered at competitive bidding, even if the only bidder was the applicant.

Nevertheless, we cannot overlook the declarations by both the Chief, Conservation Division, and the Area Mining Supervisor that section 32 `has substantial market value.' While we assume that this refers to the value as coal land, we are not certain that it does. Further, we have no means of determining the theoretical amount of a `substantial' value. The value of the tract as coal land would be relevant only in association with a showing of real competitive interest, because, as noted above, the statute envisions the addition of valuable coal lands to existing leases without competitive bidding.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the case is remanded to the Utah State Office for further action consistent with this opinion, including the obtaining of such additional reports and recommendations from the Geological Survey, in sufficient detail, as will provide the basis for an informed decision.

_____
Edward W. Stuebing
Administrative Judge

I concur:

_____
Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE THOMPSON DISSENTING

The only issue to be decided in this appeal is whether the Bureau's Utah State Office correctly applied the law and regulations in rejecting appellant's application for modification of his coal leases. I conclude it did. The primary basis for rejection was that the land requested by the modification application `can be mined as a part of an independent operation, and there is a competitive interest in this tract.' Further, the decision stated the land has substantial market value and it would not be to the advantage of the United States to award a lease noncompetitively. It concluded the application does not qualify under section 3 of the Mineral Leasing Act of 1920, 30 U.S.C. § 203 (1970). 1/

Regulation 43 CFR 3524.2-1(a) implementing section 3 of the Mineral Leasing Act governs the disposition of this case. To consider its effect it must be set fort in its entirety:

> § 3524.2-1 Coal.
>
> (a) Under section 3 of the Act-- (1) Application. Under section 3 of the Act (30 U.S.C. 203), a lessee may obtain a modification of his lease to include coal lands or coal deposits contiguous to those embraced in his lease if the authorized officer determines that it will be to the advantage of the lessee and the United States. The lessee shall file his application for modification in duplicate in the proper land office, describing the additional lands desired, the needs and reasons for and the advantage to the lessee of such modification.
>
> (2) Availability-- (i) Noncompetitive. Upon determination by the authorized officer that the modification is justified and that the interest of the United States is protected, the lease will be modified without competitive bidding to include such part of the land or deposits as he shall prescribe.
>
> (ii) Competitive. If however, it is determined that the additional lands or deposits can be developed as part of an independent operation or that there is a

1/ The decision also concluded section 4 of the Mineral Leasing Act of 1920, 30 U.S.C. § 204 (1970), was not applicable because there had been no production from the coal leases. There is no question raised on this point.

competitive interest in them, they will be offered as provided in subpart 3520.

The Bureau's decision rested upon application of paragraph (ii) quoted above which determines when lands in an application for modification of a coal lease must be offered competitively. In promulgating that regulation the Secretary of the Interior in his discretionary authority under the Mineral Leasing Act has determined the policy of the Department and decreed that where there is a competitive interest in the additional lands or they can be developed as part of an independent operation, they `will' be offered competitively. This Board is bound by the regulation and must follow it. Cf. James W. Smith, 6 IBLA 318, 79 I.D. 439 (1972). The Board has consistently held that where the Geological Survey reports (and the facts are not refuted) that either of these conditions exist (capability of independent development or competitive interest), an application to modify an existing coal lease must be denied and the lands offered for competitive leasing. Concho Petroleum Company, 22 IBLA 139 (1975); Intermountain Exploration Company, 17 IBLA 261, 81 I.D. 602 (1974); Western Slope Carbon, Inc., 5 IBLA 311 (1972).

Appellant has not refuted the determination that there is competitive interest. Instead, he says: `This could be so, but, if so, in my opinion, there was a competitive interest in the several other modifications that you granted recently.' Even if his opinion is correct and modifications may have been made in disregard of the regulation, we cannot perpetuate error. On the question of the independent operation of the coal deposits, appellant states that Peabody Coal Company is the only one who can mine the section except for himself. He also indicates that he acquired the land from Peabody and in his opinion the company `would not do anything to prevent me from securing and working said section 32.' Most of appellant's appeal concerns the conflict concerning whether section 32 is State of Utah land or federal land. He, in effect, sets up his state lease and this conflict as a basis for relief. Nevertheless, we are circumscribed by the regulation and I see no authority in the regulation for avoiding the consequences of paragraph (ii), and I disagree with the majority's attempts to do so.

Because appellant has not made any showing which would refute the determination that the conditions prescribed by paragraph (ii) are in error, I would affirm the Bureau's decision. Concho Petroleum Company, supra; Intermountain Exploration Company, supra.

Joan B. Thompson
Administrative Judge

March 1, 1976

IBLA 75-593 : SL-040862-U24069-U24070

MALCOLM N. McKINNON : Consolidated Coal Lease

ERRATUM

On November 25, 1975, this Board decided the matter in caption Malcolm N. McKinnon, 23 IBLA 1 (Thompson, A.J., dissenting). A page of the text of the majority opinion was inadvertently omitted from the majority opinion, same being all that portion from the last work on page 7 and the first word of page 8 of the decision as issued.

Accordingly, the omitted text is herewith incorporated into the text of the decision as page 7-A.

_____
Edward W. Stuebing
Administrative Judge

I concur:

_____
Douglas E. Henriques
Administrative Judge

3. The development of a mine by McKinnon on these lands would create a competitive situation which would be in the public interest.

The Area Mining Supervisor's report suggests these additional advantages:

4. Without the addition of section 32 the federal lease held by McKinnon cannot be developed. This connotes a loss of royalty to the United States, and the loss of the coal which might otherwise be produced from that lease.

5. A "very tight" coal market exists in a two-county area due to a shortage for commercial and small industrial users, which could be alleviated by the development of the mine proposed by McKinnon. This carries economic implications relating to employment and costs.

The finding in the decision below that section 32 "can be mined as part of an independent operation" could be a reason for granting the application rather than for rejecting it, since the reports show that it could be developed as part of Mckinnon's independent operation, based upon the recommendations that such a lease would form "a logical independent mining unit," and based upon the access to the outcrop thus afforded, and upon competitive considerations.

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